CHEW WOON KIAT v. TIMAH BINTI HAJI KARIM & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) September 26, 1975]

[Kuala Trengganu — Federal Court Civil Appeal No. 39 of 1975]

Land Law — Agreement for sale of land — Whether land a Malay holding — Trengganu Malay Reservation Enactment No. 17 of 1360.

Malay Reservations — "Malay holding" — Possessory owner — No registered interest as proprietor — Trengganu Malay Reservations Enactment No. 17 of 1360.

The appellant had applied for an order that the respondents as representatives of the estate of Eshah binti Mohamed @ Abdul Samad transfer the land to him by virtue of a sale agreement entered between him and the deceased. On the pleadings the two issues were (1) was the land sold or charged by the deceased to the appellant; (2) was the land subject to the Trengganu Malay Reservations Enactment? The learned trial judge dismissed the appellant's claim and the appellant appealed to the Federal Court.

Held, allowing the appeal: (1) in this case as there was a written agreement for sale, evidence to contradict the terms of the agreement should have been excluded and therefore it must be held that the land was sold not charged to the appellant;

(2) as the deceased was only a possessory owner and had no registered interest as proprietor the land was not a Malay holding within the meaning of the Trengganu Malay Reservations Enactment;

(3) the appellant was therefore entitled to obtain an order for the transfer of the land to him.

FEDERAL COURT.

Perres P. Royan for the appellant.

Respondents in person.

Suffian L.P. (read by **Wan Suleiman F.J.**): Esah binti Mohamed @ Abdul Samad had a piece of land known as K.S. 1340, Mukim of Batu Burok, Kuala Trengganu, which I shall call simply the land. This land was subsequently converted into K.S.B. 1552 and finally K.R.M. 1451, Lot 62.

On March 3, 1947, Esah and a Chinese Chew Woon Kiat the plaintiff entered into a written agreement, of which the English translation reads as follows:

" *MEMORANDUM OF AGREEMENT*

Executed in the township of Kuala Trengganu.

This 3rd day of March, 1947.

Whereas I, Che Eshah binti Abdul Samad [the deceased] of Kampong Ladang, Kuala Trengganu, the undersigned, of sound mind, today truly acknowledged the receipt of cash of $300 (Dollars three hundred only) from Chew Woon Kiat [plaintiff], the holder of this letter, being the full and final payment of a piece of land held under K. S. 1340, Mukim of Batu Burok, Kuala Trengganu.

2. I agree to execute a valid transfer of the said land at the Land Office for the price of $300 (Dollars three hundred only) of which I have duly received from Chew Woon Kiat after the conclusion of action at the Land Office in respect of transfer during the Japanese Occupation.

3. In witness whereof, we, both parties, hereby affix our signatures before the witnesses present.

RTP:.....
Che' Eshah binti Abd. Samad.

SD:.....
Chew Woon Kiat."

It will be noticed that by that agreement Esah purported to sell and the plaintiff to buy the land for $300 which price had been received by Esah.

Because of the moratorium then in force no transfer of the land was effected in favour of the plaintiff.

On July 18, 1949, while the moratorium was still in force Esah died.

Her estate came up before the Collector's court, Kuala Trengganu, for distribution and on December 22, 1964, the Collector ordered that the land be distributed to her daughter Fatimah binti Haji Karim (the first defendant) and to her ex-husband Ibrahim bin Abdullah (the second defendant) under the Small Estates (Distribution) Ordinance, No. 34 of 1955.

The plaintiff was dissatisfied with that decision of the Collector and appealed to the High Court and on January 11, 1972, the High Court ordered the parties to litigate the matter; so the plaintiff brought the suit out of which this appeal has arisen, praying for judgment that the defendants as limited representatives of the deceased's estate transfer the land to him by virtue of the sale agreement.

The defendants in their Statement of Defence resisted the claim on two grounds:

First, they say that by the agreement the deceased who was a cloth dealer only intended to pledge or charge the land to secure the payment by the deceased to the plaintiff of the price of cloth and thread supplied by the plaintiff to the deceased, and that the deceased did not intend to sell the land to the plaintiff;

Secondly, the defendants say that the land being country land under 10 acres is subject to the Malay Reservation Enactment No. 17 of 1360 which came into force on November 8, 1941, that the agreement contravened that Enactment and that the plaintiff being Chinese may not own this land.

So on the pleadings there should have been two issues:

(a) was this land sold or charged by the deceased to the plaintiff; and

(b) was this land subject to the aforesaid Enactment?

Unfortunately the learned trial judge did not deal with any of these issues. He dismissed the plaintiff's claim on three grounds, none of which was pleaded or argued. First, he held that the agreement was illegal because of the moratorium. Secondly, he held that the plaintiff was guilty of laches. Thirdly, he held that the plaintiff's claim was barred by the Limitation Ordinance No. 4 of 1953.

The learned judge was under some difficulty because, while the plaintiff was represented by counsel, the defendants were not and so probably the learned judge felt obliged to lean somewhat in favour of the unrepresented defendants.

As regards limitation, it can be said at once that the learned judge erred in holding that this suit was statute-barred, as limitation can be considered if and only if it has been pleaded, which is not the case here: *vide* section 4 of the Limitation Ordinance No. 4 of 1953 and O.19 r.15.

As regards laches, that too was not pleaded.

As regards illegality, by virtue of the Moratorium Proclamation (No. 5) there was a moratorium from

November 1, 1945, until September 30, 1949. The agreement of sale here was executed during that period. Now section 8 of the Proclamation provided that "during the period of the moratorium no person shall transact, or attempt to transact, any dealing in land except" — and there followed two exceptions which are not material. The learned judge held that by the agreement the deceased and the plaintiff did transact or attempt to transact a dealing in land, and as that was contrary to the prohibition in section 8, it was void *ab initio*. With respect to the learned judge, here too he was in error, because there was a proviso to section 8 empowering the authorities to grant exemptions from the restrictions in that section and the Governor of the Malayan Union had exempted "agreements for sale of land" from those restrictions, *vide* G.N. 1102/25.7.46. This exemption escaped the notice of the learned judge.

As regards the first issue raised by the pleadings (namely, whether the deceased had sold or merely charged the land to the plaintiff), it would have been very convenient to an appellate court if the learned judge had come to a definite finding even though on the law he ruled against the plaintiff. We have power to order a retrial, but a retrial is expensive and the policy of the court is to minimise expense, and in view of this we are constrained to help out where we can, by reaching a finding of fact and thus avoid a retrial and save expense. What is the evidence on this issue? First, there is the evidence of the plaintiff himself that he had bought this land. Then there was the evidence of Zainab binti Ibrahim given at the enquiry on December 22, 1964, before the Collector (page 45 of the appeal record), who stated that the plaintiff had bought the land and paid $300 for it. Zainab was not called at the trial in the High Court. During cross-examination the first defendant said that this Zainab was her mother-in-law and that she had died prior to the trial. This explains why she was not called by the plaintiff. As against this evidence that the land had been sold, the two defendants were emphatic in their oral evidence that the deceased had only charged, not sold the land to the plaintiff. If that had been the only evidence, this court would have had difficulty in deciding this issue, but fortunately there is the sale agreement itself the terms of which explicitly stated that by it the deceased sold and the plaintiff bought the land. Now section 92 of the Evidence Act provides that where the terms of a disposition of property have been reduced to the form of a document no evidence by any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting its terms. In view of this provision, the evidence of the two defendants purporting to contradict the terms of the sale agreement should have been excluded, and without their evidence it should have been open to the learned trial judge as it is open to us to conclude in favour of the plaintiff that the deceased had sold, not charged, the land to the plaintiff, and accordingly I would so conclude.

As regards the second issue raised by the pleadings (whether or not this land is subject to the Enactment), the uncontroverted evidence of Encik Mustafa bin Muda Abu Bakar, the Collector, was that in 1947 (the year of the sale agreement) the land was still an A.M.T. 1351, that the deceased was then only a *possessory* owner and that the land is country land not more than 10 acres in area. From this it is clear that in 1947 the deceased, though a Malay, had no *registered* interest as proprietor and therefore the land was not a Malay holding within the meaning of section 2 of the Enactment, that it was not subject to the restrictions in section 9 and that it could therefore have been transferred to a non-Malay. Accordingly it is argued by Encik Royan before us that the court has power to and should order specific performance of the agreement of sale in favour of the plaintiff. Encik Royan brings to our attention the amendment made by Trengganu Enactment No. 3 of 1951 which amended the definition of "Malay holding" by also including within it "any recorded interest of a Malay as occupier .... in any country land comprised in any holding not more than 10 acres in area and occupied under a recorded possessory claim under the Settlement Enactment". Under this amendment this land has therefore become a Malay holding.

Encik Royan, however, argues that the widening of the definition does not affect the right of the plaintiff under the sale agreement because at the date of that agreement the land was not a Malay holding. With respect I agree. Section 21 of the principal Enactment provides —

> "(i) all dealings or disposals whatsoever and all attempts to deal with or dispose of any Malay holding contrary to the provisions of this Enactment shall be null and void ..." and
>
> "(ii) No action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal with or dispose of any Malay holding contrary to the provisions of this Enactment."

At the time of the sale agreement this land was not a Malay holding and so the dealing between the deceased and the plaintiff was not contrary to the Enactment and not caught by the restrictions contained in the Enactment. It is true that since then this land has become a Malay holding, but in my judgment it would be unfair to give retrospective effect to the 1951 amendment to the detriment of the plaintiff's vested right. If the legislature had intended to destroy the plaintiff's vested right, it should have used very clear words to that effect; it did not do so.

In the circumstances, I would therefore allow this appeal. The judgment of the learned judge is set aside and instead there shall be judgment as follows:

(i) the defendants are hereby ordered to execute within one month of this order a memorandum of transfer in respect of this land in favour of the plaintiff;

(ii) in the event of the defendants failing to do so, the Senior Assistant Registrar, High Court, Kuala Trengganu, is hereby empowered to sign a memorandum of transfer on behalf of the defendants in favour of the plaintiff;

(iii) the defendants to pay costs here and below; and

(iv) the plaintiff/appellant's deposit to be returned to him.

Appeal allowed.

Solicitors: *Datuk Bijaya & Co.*